LIAN KEOW SDN. BHD. & ANOR.

v.

OVERSEAS CREDIT FINANCE (M) BHD. & ORS.

FEDERAL COURT, KUALA LUMPUR
SUFFIAN LP
SALLEH ABAS FJ
ABDUL HAMID OMAR FJ
[APPEAL NO. 92 OF 1981]
1 & 24 MARCH 1982

CIVIL PROCEDURE: *Interlocutory injunction - Application to set aside order of interlocutory injunction and payment into Court allowed by High Court - Appeal to restore order - Nature of interlocutory injunction - Principles that should guide a Judge in the exercise of his discretion - Function of appellant with regard to appeal against decision resulting from exercise of discretion given to Judge.*

Upon a petition presented by the Federal Government in 1978, a winding-up order was issued in 1979 ordering the first appellant to be wound-up and the second appellant to be constituted provisional liquidator for the appellant.

In April 1980, the first and second appellants issued a writ against the respondents claiming that a series of transactions consisting of transfers, charges and sales in respect of the first appellant's rubber estate executed before and after the presentation of the petition for the winding order were all invalid.

The contention of the appellants in the suit was:

(a) the charges of the estate were all invalid because no consideration whatever was received by the first appellant and because the charges contravened s. 108 of the Companies Act;

(b) the transfers of the estate to the first respondent were null and void because they were not conducted at arms' length and because they were executed contrary to ss. 223 and 293 of the Companies Act and s. 53 of the Bankruptcy Act 1967;

(c) the transfers to the second respondent were also void because the sale was grossly under-valued and also contrary to s. 340(4) of the National Land Code, ss. 223 and 293 of the Companies Act and s. 53 and 53B of the Bankruptcy Act;

(d) likewise the transfers to the third respondent were void.

The appellants therefore prayed for declarations that all the transactions were null and void and for an order that the proceeds of the sale in the hands of the respondents be paid to the second appellant. They also asked the first respondent to render an account in respect of their possession of the estate from 1975 to 1979.

On the same date the appellants obtained upon *ex parte* application by summons in chambers from Annuar J, an interlocutory injunction restraining the first and second respondents from receiving and releasing the proceeds of the sale of the estate and restraining the third respondent from releasing the same to the first and second respondents. The order also required all the three respondents to pay to court the proceeds of the sale to be placed on fixed deposit until final determination of the civil suit.

The second and third respondents applied to the High Court to set aside the order. The first respondent did not apply as an agreement to place the proceeds of sale on fixed deposit had already been reached with the appellants. The application of the third respondent was later withdrawn by his counsel. In any case, the order would not have been effective against him since the proceeds of the sale were released to the first and second respondents some five months before the order was made. That left only the application by the second respondent to be considered by Yusoff J who allowed the application. The Judge held that without opposing affidavits on arguments heard from the defendants, the Court could not be able to consider the balance of convenience to justify the Court's interference in granting the interlocutory relief.

The appellants appealed to restore the order

Held:

[1] On the basis of the material before the Court, there were a number of serious questions to be tried in the suit.

Per Curiam: An interlocutory injunction is a temporary and discretionary remedy. To consider whether to grant it or to refuse it the Court is not concerned with the chances of success or failure of the civil suit or to evaluate the evidence and materials before it for that purpose. It is simply concerned with what it has to do in the meantime in order to protect the right of the parties so that no irrepairable injury would be caused to either of them. Further, whilst the Court is not concerned with such question, the Court must however be satisfied that there are serious questions to be gone into in that suit, lest an application for an injunction should be made on frivolous and vexatious grounds. [*American Cyanamid v. Ethicon Ltd.* [1975] A.C. 398]

[2] Yusoff J should have decided the matter on the basis of those affidavits and arguments which were before him, and not to decide it on the basis of materials available before Annuar J.

Per Curiam: It is a misstatement of law to say that no balance of convenience could be considered at all until the opposing party has filed its contrary affidavits, as the Court's function is to decide the case one way or the other upon the basis of evidence before it. A decision cannot be postponed for extra evidence to be filed or adduced, except where the Court thinks that justice requires such postponement.

[3] The test of adequate compensation by payment of damages adopted by Yusoff J in considering the balance of convenience in the case was wholly inappropriate as it was not applicable by facts in the case. [*American Cyanamid* (*infra*) distinguished]. The proper factor to be taken into consideration was the financial ability of the second respondent to make available to the Court those proceeds of the sale as and when ordered.

[4] There were two factual errors in the Judge's reasoning. In applying the test of balance of convenience, the Judge had held that if the appellants succeeded at the trial of the suit, "the appellants would be adequately compensated by damages for the interim continuance" of the second and third respondents' activities, that is, to complete the sale of these lands," and conversely, if the respondents succeeded at the trial, they would not be adequately compensated by the appellants' undertaking as to damages because the interlocutory injunction imposed would deprive the third respondent of "the immediate use of the lands which they had paid for".

In the first place, the injunction was not sought to prevent the completion of the sale, as that was already completed, but to prevent the second respondent from freely dealing with the proceeds of the sale in its hands as it wished. In the second place the interlocutory injunction was not intended to restrain the third respondent from entering upon the estate or otherwise using it, nor would it have such effect. The question involved a question of funds, being the proceeds of the sale of the first respondent's estate in the hands of the second respondent which proceeds, the appellants claim, should be accounted for and paid to them.

[5] Having regard to the suit between the parties and to the fact that only the proceeds which were in the hands of the second respondent which were not secured, it was the appellants, and not the respondents, who would be greatly prejudiced if the second respondent was allowed to use the money in the meantime. There was always the possibility of the second respondent becoming insolvent and being unable to make the proceeds available by the time the suit was finally determined.

[6] Although the function of an appellate Court with regard to the exercise of discretion by a Judge in granting or refusing an interlocutory injunction is one of review only and must defer to the Judge's decision in the matter, the Court was justified in overruling the decision of the Court below as the Judge's decision was based upon a misunderstanding of the law and the facts before him. [Lord Diplock in *Hadmor Productions Ltd. & Ors. v. Hamilton & Anor.* [1982] WLR 322]

[Appeal allowed with costs.]

Cases referred to:
American Cyanamid v. Ethicon Ltd. [1975] AC 396
Hadmor Productions Ltd. & Ors. v. Hamilton & Anor. [1982] 2 WLR 322

Legislation referred to:
Bankuptcy Act 1967, ss. 53, 53B
Companies Act 1965, s. 108, 223, 293
National Land Code Act 56/1965, s. 340(4)

For the appellant - T. Thomas; Skrine & Co.
For the respondent - Ho Thian Cheh; Ho Thian Cheh & Co.

JUDGMENT

Salleh Abas FJ:

We have already allowed the appeal in this case at our sitting on 1 March 1982. Here are our reasons for allowing it. First the facts which are as follows.

Upon a petition presented by the Federal Government on 13 November 1978, a winding-up order was issued by the Johore Bharu High Court on 11 March 1979 ordering the first appellant to be wound up and the second appellant to be constituted provisional liquidator for the affairs of the first appellant.

On 13 April 1980 the first and second appellants issued a writ against the 1st, 2nd and 3rd respondents (Johore Bharu Civil Suit No. 100/80) claiming that a series of transactions consisting of transfers, charges and sales in respect of the first appellant's rubber estate executed before and after the presentation of the petition for the winding order were all invalid. The writ asked for declarations that all these transactions were null and void and for payment of the proceeds of such transactions to be made to the second appellant. On the

same date the appellants obtained, upon an *ex parte* application by summons-in-chambers from Anuar J, an interlocutory injunction restraining the first and second respondents from receiving and releasing the proceeds of sale of the estate and restraining the third respondents. This order also required all the three respondents to pay to Court the proceeds of the sale of the estate to be placed on fixed deposit until final determination of the civil suit.

On 26 and 27 April 1980, the third and second respondents applied to the High Court to set aside the order of Anuar J as to interlocutory injunction and payment to Court. The first respondent did not apply to set aside the order presumably because an agreement had been reached that the proceeds of sale held by it amounting to RM4,636,800 were placed on fixed deposit until final determination of the suit (see appellants' solicitors' letter dated 18 December 1981, referred to as MAI in Mokhtar bin Abdullah's affidavit sworn on 17 February 1982). The application of the third respondent, after considerable argument before Yusoff J was withdrawn, on 15 November 1980 by its Counsel, Mr. Puthucheary. In any case the interlocutory injunction and the order could not be effective against the third respondent since the sale of the estate had already been completed and the proceeds were released to the first and second respondents some five months before the order was made. The release was made on 27 November 1979 whilst the interlocutory injunction was only ordered on 13 April 1980. That being the case, the only matter left to be considered by Yusoff J was the application of the second respondent. The learned Judge allowed the application and thus set aside the order of Anuar J as to the interlocutory injunction and payment of the proceeds to Court made against the second respondent. Hence the appellants appealed to us in order to restore that order.

The proceeds of sale received by the second respondent from the third respondent in connection with the sale of the 1st appellant's estate is RM3,410,742.13. The interlocutory order against the second respondent is to restrain them from dealing with this sum and to require them to pay it to Court to be placed on fixed deposit until final determination of the suit. It is obvious that the purpose of the injunction is to ensure the availability of funds at the end of the civil suit so that should the appellants succeed in it they would be able to get their judgment satisfied immediately.

An interlocutory injunction is a temporary and discretionary remedy. To consider whether to grant it or to refuse it the Court is not concerned with the chances of success or failure of the appellants in proving their civil suit at the forthcoming trial, neither is the Court's function to evaluate the evidence and materials before it for that purpose. The Court is simply concerned with what it has to do in the meantime in order to protect the right of the parties so that no irreparable injury would be caused to either of them. Further whilst the Court is not concerned with such questions the Court must however, be satisfied that there are serious questions to be gone into in that suit, lest an application for an injunction should be made on frivolous and vexatious grounds. (*American Cyanamid v. Ethicon Ltd.* [1975] AC 396). In this case on the basis of the materials before us, we are satisfied that there are a number of serious questions to be tried in the suit. Briefly the facts relating to the civil suit as disclosed in the statement of claim are as follows.

The first appellant was the owner of a rubber estate comprising 870 acres in the Mukim of Pulai in the District of Johore Bharu. The estate was held under five separate titles: i.e. three States Leases, one C.T. and one Grant. The parts of the estate held under the three State leases were charged to the first respondent in 1972, whilst the parts held under C.T. and Grant were transferred to one Mr. C. Paramjothy and one Mr. Wong Peng Fun respectively

in the early part of 1973 to be held by them as trustees for the first appellant. Subsequently in 1975 both Mr. C. Paramjothy and Mr. Wong Peng Fun charged these parts of the estate (in respect of which they were trustees) to the first respondent, who thus became charge of the whole estate. The first respondent then entered into possession of the estate and continued to remain in possession until it sold it to the second respondent in October 1979.

In the meantime after the petition for the winding-up order of the first appellant was presented to the High Court, the first respondent, who was then chargee of the whole estate, became the registered owner thereof on 21 and 30 November 1978. About a year later, i.e. 30 October 1979, it sold the whole estate to the second respondent for a sum of RM5,152,000. The second respondent in turn within a matter of one month, i.e. 27 November 1979 sold it to the 3rd respondent for a total consideration of RM9,977,903.13. Finally the transfer of titles in the name of the third respondent was registered on 29 January 1980, i.e. about three months prior to the institution of the civil suit and the grant of the impugned interlocutory injunction. The sum of RM9,977,903.13 being the proceeds of the sale of the estate was paid out by the third respondent as follows:

(a) RM4,636,800 to the first respondent;

(b) RM3,410,742.13 to the second respondent; and

(c) RM1,930,361 to the solicitors of the second respondent to be held for payment of real property gains tax.

Payments to the first and second respondents were made on 27 November 1979, i.e. the date of the sale of the estate to the third respondent itself, whilst payment to the solicitors was made on 17 December 1979.

The appellants contended that:

(a) the charges of the estate by the first appellant in 1972 and by Mr. C. Paramjothy and Mr. Wong Peng Fun in 1975 to the first respondent were all invalid because no consideration whatever was received by the first appellant and also because the charges contravened s. 108 of the Companies Act for failing to register the same with the Registrar of Companies within 30 days of execution;

(b) the transfers of the estate to the first respondent which were completed i.e. registered on 21 and 30 November 1978 were null and void because they were not conducted at arms' length and also because they were executed contrary to ss. 223 and 293 of the Companies Act and s. 53 of the Bankruptcy Act;

(c) the transfers to the second respondent were also void because the sale was grossly undervalued and also contrary to s. 340(4) of the National Land Code, ss. 223 and 293 of the Companies Act and ss. 53 and 53B of the Bankruptcy Act 1967; and

(d) likewise the transfers to the third respondent were void for contravening the aforesaid laws.

The appellants therefore prayed for declarations that all these transactions were null and void and for an order that the proceeds of the sale in the hands of the respondents be paid to the second appellant. They also asked the first respondent to render an account in respect of their entering and remaining in possession of the estate from 1975 to October 1979.

Thus looking at the pleadings and the affidavits before us, we are more than satisfied that in the dispute between the appellants and the respondents and other parties to the dispute there are several serious questions to be tried.

The matter with which we are asked to deal in the meantime until final determination of the dispute is the sum of RM3,410,742.13 in the hands of the second appellant representing part of the proceeds of the sale of the first appellant's estate. The appellants contended that this sum should be paid to Court to be placed on fixed deposit and that the second respondent should be restrained by the interlocutory injunction from making use of it in the meantime. The second respondent on the other hand submitted that no such order and injunction should be imposed on it Yusoff J agreed with this submission as he found that the balance of convenience lay with refusal to make such injunction and order.

Whilst the learned Judge accepted that there are serious questions to be gone into, in obvious reference to the *ex parte* proceedings before Anuar J he said that:

> without opposing affidavits or argument heard from the defendants, the Court could not be able to consider the balance of convenience to justify the Court's interference in granting the interlocutory relief.

This statement appears to have originated from the submission of Counsel for the second respondent to the effect that the order made by Anuar J was made without proper argument as the writ and the application for injunction were filed on the same day (see pp. 198 to 199 of Appeal Records). The same submission was repeated before us. With respect we think that this statement goes too far. The balance of convenience, whether for refusing or allowing the interlocutory injunction asked for, could always be considered by the Court on the basis of the materials before it, irrespective of whether there are no opposing affidavits and arguments filed or heard. If in an *ex parte* application, the Court grants the order, it is of course open to the Court to set it aside later if upon considering the affidavits and arguments of the opposing party or parties, the Court thinks that the balance of convenience lies in refusing it. It is equally open to the Court to affirm the interlocutory injunction if upon the evidence before it, the Court thinks that the balance lies in granting it. Whatever complaint could be made regarding lack of opposing affidavits and arguments in this case, surely when the matter came before Yusoff J all these affidavits and arguments were before him. He should therefore decide the matter on the basis of those affidavits and arguments which were before him, and not to decide it on the basis of materials available before Anuar J. To say that no balance of convenience could be considered at all until the opposing party has filed its contrary affidavits and advanced its arguments is certainly a misstatement of law as the Court's function is to decide the case one way or the other, for or against upon the basis of evidence before it. It is not to postpone making a decision for extra evidence to be filed or adduced, except where the Court thinks that justice requires such postponement.

In considering the balance of convenience in this case, the learned Judge adopted the test of adequate compensation by payment of damages enunciated by Lord Diplock in *American Cynamid*'s case. The learned Judge held that if the appellants succeeded at the trial of the suit, "the appellants would be adequately compensated by damages for the interim continuance of the second and third respondents' activities, that is, to complete the sale of these lands." And conversely if the respondents succeeded at the trial, they would not be adequately compensated by the appellants' undertaking as to damages because the interlocutory injunction imposed would deprive the third respondent of "the immediate use of the lands which they had paid for."

With respect there are two factual errors in this reasoning. In the first place the injunction was not sought to prevent the completion of the sale; this having been completed; but it was sought in order to prevent the second respondent from freely dealing with the proceeds of the sale in its hands as it wished. In the second place the interlocutory injunction was

not intended to restrain the third respondent from entering upon the estate or otherwise using it, nor would it have such effect. There seems to be a confusion of facts somewhere.

If the test of adequate compensation is to be taken, the appropriate question which should be framed is this. In the event of the appellants succeeding at the trial of the suit, would they be adequately compensated by payments of damages for whatever injury which might have been caused to them by the second respondent's freedom to use the money in the meantime, and also would the second respondent be at that time in a financial position to pay them? But looking at the facts of this case, we do not think that this test is applicable here because there is no continuance of violation of the appellants right in the meantime which requires protection. Whereas in the *American Cyanamid's* case there was such continuance. In that case the appellants sued the respondents for a permanent injunction on the ground that the respondents were violating the appellants' patent right by selling certain pharmaceutical products and in the meantime until final determination of the dispute the appellants applied for an interlocutory injunction restraining the respondents from selling and marketing the products. There was thus a right, i.e. patent right though in dispute, which required to be protected. In the present case there is no such continuous breach of the appellants' right, but there is this question of funds, being the proceeds of the sale of the first respondent's estate in the hands of the second respondent which the appellants claim, should be accounted for and paid to them. In the circumstances we consider that the test of adequate compensation for damages adopted by the learned Judge is wholly inappropriate as it is not applicable to facts in this case. We think that the proper factor to be taken into consideration in determining where the balance of convenience lies is the financial ability of the second respondent to make available to the Court those proceeds as and when it so orders. If the appellants succeed at the trial, there is a possibility that they may not be able to enjoy the fruits of their success if these proceeds are not secured by an injunction and order sought for because by the time the trial will have been completed, the second respondent might have been insolvent, and might no longer be in a position to have that much money, or it may even be liquidated. It is in order to prevent this sort of situation from occurring that the interlocutory injunction was asked for. After all the test of adequate compensation by the award of damages or undertaking to pay damages is not the only test envisaged by Lord Diplock in weighing the balance of convenience. His Lordship said:

> ... It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to attached to them. They will vary from case to case.

Finally in taking the approach stated above, we must consider whether the second respondent is likely to be prejudiced by this injunction and order. We observe that the proceeds in the hands of the first respondent are already secured by agreement to be placed on fixed deposit; whilst the part that is meant for the real property gains tax is held by the solicitors of the second respondent. It is only the proceeds in the hands of this respondent which are not secured and we are now called upon to decide what to do with them in the meantime. Having regard to the suit between the parties and to other proceeds having been secured, we cannot see how the second respondent would be in any way prejudiced by the injunction and the payment of such proceeds to Court as prayed. On the other hand the appellants would be greatly prejudiced if the second respondent is allowed to use the money in the meantime. There is always the possibility of the second respondent becoming insolvent and unable to make the proceeds available by the time the suit is finally determined.

Although the function of an appellate Court with regard to the exercise of discretion by a Judge in granting or refusing an interlocutory injunction is one of review only and we must defer to the Judge's decision in the matter, we however feel justified in this case in overruling the decision of the Court below because we are of the opinion that the learned Judge's exercise of discretion in setting aside the interlocutory injunction and order previously made by Anuar J was based upon a misunderstanding of the law and the facts before him (see Lord Diplock in *Hadmor Productions Ltd. & Ors. v. Hamilton & Anor.* [1982] 2 WLR 322, 325). Such misunderstanding led him to take into consideration questions which ought not to be considered as they are not justified by the facts in this case.

We thus allowed the appeal with costs.

Also found at [1982] CLJ 350